Supreme Court, U.S.
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92-1567

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JUANITA S. BROWN,

Petitioner,

v.

INSHIRAH FARHOUD and
GERMANTOWN MUTUAL INSURANCE COMPANY,

Respondents.

Petition for Writ of Certiorari to the Wisconsin Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the Due Process and Equal Protection Clauses of the Fourteenth Amendment violated by Wisconsin's statutory scheme and its case law interpretation of that statutory provision, which permits a judge to continue to preside over a case on the judge's mere assertion of impartiality despite a documented history of partiality against litigant's attorney?

PARTIES BELOW

The names of all parties to the proceedings in the Wisconsin Supreme Court appear in the caption of the case. The Petitioner does not have a parent company or any subsidiaries.

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OPINIONS BELOW

The Order from the Wisconsin Supreme Court denying the Petitioner's Petition for Review is reproduced in the Appendix to this Petition at App. 1-3. The decision of the Wisconsin Court of Appeals denying the Petitioner's motion to vacate the Court of Appeals opinion filed February 2, 1992 is reproduced in the Appendix to this Petition at App. 4-9.

JURISDICTION

The order by the Wisconsin Supreme Court denying the Petition for Review is dated December 23, 1992. 28 U.S.C. § 1257(a) confers jurisdiction on this court to review the judgment in question by *writ of certiorari.*

Since this petition draws into question the constitutionality of a statute of the State of Wisconsin a copy of this petition is being served on the Attorney General of Wisconsin, pursuant to 28 U.S.C. § 2403(b).

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Juanita Brown (Brown) instituted a lawsuit in a Wisconsin state court for personal injuries she received as a result of the negligence of the respondent, Inshirah Farhoud. Following an unfavorable ruling to Brown by the trial court involving a question of remittitur on a damage award to Brown, she appealed her case to the Wisconsin Court of Appeals. The attorney representing Brown in the trial court and before the Wisconsin Court of Appeals at the time of Brown's appeal from the trial court's

decision was Attorney Gerald R. Turner (Turner). A three judge panel of the Wisconsin Court of Appeals decided adversely to Brown in a two to one decision dated February 4, 1992; Judges Ralph Adam Fine and William R. Moser in the majority. Judge Michael T. Sullivan dissented.

On July 17, 1992, Brown filed a motion in the Wisconsin Court of Appeals requesting it to vacate its decision of February 4, 1992. In sum, the basis for Brown's motion was that Judge Fine should not have participated in and decided the appeal released on February 4, 1992 due to Judge Fine's repeated recusals and disqualifications from all cases in which Turner was involved stretching over nine years and at least six cases while Judge Fine was a trial court judge. Brown provided documentary evidence and affidavits which unequivocally showed that Judge Fine *had recused himself* from every case in which Turner was involved beginning in the early 1980s and stemming from a confrontation between Judge Fine and Turner in 1981. (Emphasis added) Brown further contended that had Judge Fine been disqualified from the February 4, 1992 decision, it may not have been adverse to Brown as Judge Fine was part of the two judge majority and the issue was one of law in which the court did not owe deference to the trial court's decision.

In an opinion released on October 6, 1992, the Wisconsin Court of Appeals denied Brown's motion to vacate its February 2, 1992 decision finding that because Judge Fine himself had determined (as an addendum to the October 6, 1992 decision) that he could act impartially on the appeal, the requirements of § 757.19(2)(g), Wis. Stats. and *State v. American TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 443 N.W.2d 662 (1989) had been met. App. 4-9. Section 757.19(2)(g), Wis. Stats. says:

> **Disqualification of judge. . . .**
>
> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> * * *
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

No consideration was given by the Wisconsin Court of Appeals to the due process objective analysis as stated in prior Wisconsin Supreme Court opinions nor to the Wisconsin case law which says a litigant should not be placed in the position of having to ask a judge to recuse himself/herself. *State v. Carviou*, 154 Wis. 2d 641, 646, 454 N.W.2d 562 (Ct. App. 1990). The objective analysis requires disqualification on the "appearance" of partiality.

On November 5, 1992, Brown filed her Petition for Review of the Wisconsin Court of Appeals' October 6, 1992 decision to the Wisconsin Supreme Court. Brown argued that Wisconsin case law guarantees litigants a decision by a fair and impartial judge. She argued that it was necessary to determine whether there was an "appearance" of a judge's partiality or whether partiality could reasonably be questioned. Brown asserted her constitutional rights were denied because this analysis was not entertained by operation of § 757.19(2)(g), Stats., which permits a judge to resolve the question of bias simply by saying "I'm not biased."

On December 23, 1992, the majority of the Wisconsin Supreme Court ordered that Brown's Petition for Review be denied with Justice Shirley S. Abrahamson dissenting. App. 1-3. The Wisconsin Supreme Court provided no reason for denial of Brown's Petition.

REASONS FOR GRANTING THE WRIT

THE HIGHEST WISCONSIN STATE COURT DECIDING THE ISSUE OF DISQUALIFICATION HAS FAILED TO AFFORD THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Due process of law requires, among other things, that a trial be had, or a decision be made, before a fair and impartial judge. *In re Murchison*, 349 U.S. 133, 136 (1955); *State v. Walberg*, 109 Wis. 2d 96, 105, 325 N.W.2d 687 (1982). In conformance with these principles, Wisconsin has guaranteed a litigant, since at least the 1970s, a judge who not only says he or she is impartial and unbiased but a judge who "appears" to be impartial and unbiased. *Walberg*, 109 Wis. 2d at 106; *State v. Asfoor*, 75 Wis. 2d 411, 436, 239 N.W.2d 529 (1977). The "appearance" of impartiality test has been referred to by *Walberg* as the "objective test." *Walberg*, 109 Wis. 2d at 106.

A litigant's right to a judge who "appears" impartial is also guaranteed by the Wisconsin Code of Judicial Ethics. In Wisconsin Supreme Court Rule 60.01(3) it is stated, "A judge should administer the law free of partiality and the appearance of partiality."

Moreover, this Court has stated in varying contexts that a litigant is entitled to a judge who appears fair and impartial so as to satisfy the litigant's due process rights. *See Liljeberg v. Health Services Corp.*, 486 U.S. 847 (1988); *Aetna Life Insurance Company v. LaVoie*, 475 U.S. 813 (1986); *In re Murchison*, 349 U.S. 133 (1955).

Finally, the United States Congress considered the importance of having a judge (albeit a federal judge) who appears to be impartial presiding over a case when it en-

acted 28 U.S.C. § 455 which provides in part, "[A judge] shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Despite the due process guarantees stated herein, Brown was denied these basic rights. As evidenced by the Wisconsin Court of Appeals decision, Judge Fine made his own determination that he was impartial and, based upon the Wisconsin Court of Appeals interpretation of the state of the law on disqualification in Wisconsin, Judge Fine was able to preside over the decision which was adverse to Turner's client. There was no objective due process analysis. There was no consideration by another judge or panel of judges as to whether there was an appearance of partiality or whether impartiality might reasonably be questioned which should disqualify Judge Fine from presiding over the appeal. The Wisconsin Court of Appeals relied upon § 757.19(2)(g), Wis. Stats. and that statute's interpretation by the Wisconsin Supreme Court in *American TV*, 151 Wis. 2d at 186, without regard to the objective analysis stated above. App. 4-9.

The statutory escape hatch of § 757.19(2)(g), Wis. Stats. creates a presumption of fairness and constitutionality which is illusory. It puts the burden on the petitioner to prove a negative. Despite an objective history which speaks for itself, the judge is permitted to say, "I was biased before. I'm not any longer, trust me," and the litigant has no choice but to accept that representation.

The unfairness of the process as applied to Brown is readily apparent when one considers the history of the relationship between Judge Fine and Turner. This history evidences an unbending practice by Judge Fine since the early 1980s while he sat on the trial court bench *to recuse himself from all cases in which Turner had appeared.*

(Emphasis added) This practice demonstrates that not only had Judge Fine already determined that he could not act impartially on any case in which Turner was involved, but demonstrates an overwhelming "appearance" of partiality. Turner never sought Judge Fine's disqualification. Turner never knew when a case was assigned to Judge Fine whether the judge would disqualify himself. Judge Fine disqualified himself on every case in which Turner was the attorney over a nine year period preceding the filing of Brown's appeal. Turner was constantly in the position of having to wait for the other shoe to drop. When the Brown case went to Appeals Court Turner had reason to reliably anticipate that Judge Fine would once again recuse himself. Turner shouldn't have had to ask Judge Fine whether he was going to recuse himself nor should he have to seek Judge Fine's disqualification. To place a litigant in that situation is unconscionable. *State v. Carivou, supra.*

As this petition was going to print, Turner received a decision of the Wisconsin Appeals Court District I, written by Judge Fine. It has been attached hereto as App. 10-11. Turner had another case, *Lukowski v. Dankert*, No. 92-2369 (Wis. Ct. App. March 16, 1993), which he recently appealed. Turner asked Judge Fine to recuse himself from the panel that might hear the case. Judge Fine refused citing the decision from the Court of Appeals in this case. A situation has now been created whereby the judge continues to review his or her own decisions. There is no independent reviewer of the decision of the judge who despite a history of self-proclaimed partiality says, "I am no longer biased".

Turner poses this question, can a judge who has been admittedly biased against an attorney review his own bias on the question of self-recusal, without being biased? The

due process and procedural irregularity of this system is patent and contrary to the development of our liberty. *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921).

Similar due process irregularity was the basis for this Court's decisions in *Mayberry v. Pennsylvania*, 400 U.S. 455, 464-465 (1971); *Johnson v. Mississippi*, 403 U.S. 212, 215-216 (1971), and *Taylor v. Hayes*, 418 U.S. 488, 500-501 (1974), which held that the question of contempt, whether or not involving a personal attack on the judge, should be adjudicated by another judge. This procedural regularity was held to be essential to due process. It should be no less the case here.

The failure of the highest Wisconsin court deciding this issue of disqualification to consider the objective, "appearance of partiality test" was a denial of due process guaranteed to Brown by the Fourteenth Amendment to the United States Constitution. In failing to consider Brown's Petition for review, the Wisconsin Supreme Court has declined to address this important issue involving constitutional rights.

In its ruling in *American TV, supra*, the Wisconsin Supreme Court has given its imprimatur to a statutory scheme which totally disregards Wisconsin's objective appearance of partiality test of *Walberg, supra*, and that set forth by the U.S. Supreme Court to pass constitutional muster in *Liljeberg, Aetna Life* and *Murchison, supra*. The combination of § 757.19(2)(g) and the interpretation of it in *American TV*, worked to violate Brown's constitutional right to due process of law.

By providing some litigants with a two step analysis as to when a judge should be disqualified, that is, a sub-

jective *and* objective analysis, i.e., *Walberg*, 109 Wis. 2d at 106, the Wisconsin Court of Appeals by determining that Judge Fine should not be recused applying only the subjective analysis, denied Brown her right to equal protection under the law.

CONCLUSION

Brown was denied her right to a fair and impartial judge and to due process guaranteed by the Fourteenth Amendment to the United States Constitution. Despite overwhelming evidence of partiality and a history of predetermined personal disposition of partiality, Judge Fine did not recuse himself. In response to Turner's objection to that decision the Wisconsin Court of Appeals ruled that since Judge Fine had, after the fact, stated that he wasn't biased, (despite all the objective evidence to the contrary) that that such a determination satisfied § 757.19(2)(g), Wis. Stats., and its interpretation in *American TV supra*. Due process guarantees a litigant a fair and impartial judge. Brown was denied this right because the same judge who had disqualified himself in every case her lawyer appeared on over a nine year period decided not to recuse himself on her case, saying effectively "ignore the history I am no longer biased against your attorney." The result turned out to be sadly predictable. Judge Fine was in a two to one majority on an issue to which the appeals court owed no deference to the findings and rulings of the trial court.

Moreover, providing some litigants with the benefit of recusal of a judge who "appears" to be partial, *Walberg, supra* while denying Brown the same benefit because the judge says he's not biased violates her rights to equal

protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Certiorari should be granted.

Dated: March 23, 1993.

Respectfully submitted,

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You are hereby notified that the Court has entered the following order:

No. 91-0444 *Brown v. Farhoud* L.C. #707560

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-petitioner Juanita S. Brown, and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Shirley S. Abrahamson, J. (dissenting). I would grant the petition for review because I believe the court should address (1) the standard a judge should apply in deciding whether to recuse himself or herself from a case; (2) the standard and appellate court should apply in reviewing a judgment in a case in which the judge created an appearance of partiality; and (3) whether the due process right to a fair trial requires the court to use an objective standard for disqualification of a judge.

These issues have been the subject of several recent petitions for review or petitions for supervisory writs.[1] In those petitions, and in the petition presently before the court, counsel have asserted that it is difficult to identify a consistent standard in decisions of this Court. I agree. *Compare Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *In re Murchison*, 349 U.S. 133, 136 (1955); *State v. American TV & Appliance*, 151 Wis. 2d 175, 443 N.W.2d 662 (1989) (Abrahamson and Bablitch, J.J., not participating); *State v. Walberg*, 109 Wis. 2d 96,

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[1] *See State v. Tellier*, Case Nos. 90-2207 and 90-2208-CR, order filed February 11, 1992 (denial of a petition for review relating to recusal) (Abrahamson, J., dissenting); *State v. Rochelt*, Case No. 89-CF-1003, order filed February 11, 1992 (denial of a petition for review relating to recusal) (Abrahamson, J., dissenting); *State v. Becholt*, Case No. 90-1306 and 91-0500-W, order filed June 3, 1991 (denial of a petition for review and supervisory writ relating to recusal) (Abrahamson, J., dissenting); *State ex rel. National Union Fire Insurance Co. v. Circuit Court for St. Croix County*, Case No. 90-0935-W, order filed May 29, 1990 (denial of a petition for a supervisory writ relating to recusal) (Abrahamson, J., dissenting). *See also Disciplinary Proceedings against Crosetto*, 160 Wis. 2d 581, 602-03, 466 N.W.2d 879 (1991) (Abrahamson, J., dissenting).

325 N.W.2d 687 (1982) (habeas corpus granted, 766 F.2d 1071 (7th Cir. 1985)); *State v. Asfoor*, 75 Wis. 2d 411, 249 N.W.2d 529 (1977); *State v. Rochelt*, 165 Wis. 2d 373, 377-82, 477 N.W.2d 659 (Ct. App. 1991); *State v. Carviou*, 154 Wis. 2d 641, 454 N.W.2d 562 (Ct. App. 1990); *Matter of Mason*, 916 F.2d 384 (7th Cir. 1990).

For these reasons I believe the court should grant the petition for review.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 6, 1992

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 91-0444

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

JUANITA S. BROWN,

Plaintiff-Appellant,

SENTRY INSURANCE COMPANY,

Plaintiff,

v.

INSHIRAH FARHOUD, and
GERMANTOWN MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

ON motion to vacate court of appeals opinion filed February 2, 1992.

Motion to vacate denied.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Juanita Brown moves the court to vacate its decision in *Brown v. Farhoud*, No. 910444 (Wis. Ct. App. Feb. 4, 1992). She contends that Judge Fine, one of the three judges who participated in the decision, was disqualified as a matter of law and that the decision is void. We conclude that Judge Fine was not disqualified as a matter of law and deny her motion.

We first address the issue of our jurisdiction to consider Brown's claim. The general rule is that we have no jurisdiction to vacate or modify a judgment after the record is remitted to the trial court. *See State v. American TV & Appliance*, 151 Wis. 2d 175, 178, 443 N.W.2d 662, 663 (1989); *Ott v. Boring*, 131 Wis. 472, 491-92, 111 N.W. 833, 835 (1907). The record was remitted in *Brown* on March 1, 1992. Brown did not bring the motion to vacate the decision until July 17, 1992, after the record had been remitted.

Despite the postremittitur rule, however, we retain jurisdiction to modify or vacate our decision where a judge is disqualified by law from participating in a case. *American TV*, 151 Wis. 2d at 180-81, 443 N.W.2d at 664. This is because "[a] judgment or order which is void may be expunged by a court at any time," and the "right to expunge a void order or judgment is not limited by statutory requirements for reopening, appealing from, or modifying orders or judgments." *Id.* at 181, 443 N.W.2d at 664, quoting *State ex rel. Wall v. Sovinski*, 234 Wis. 336, 342, 291 N.W. 344, 346 (1940). Thus, in the interest of justice and to avoid even the appearance of impropriety, we exercise our jurisdiction to consider Brown's claim.

We next consider whether Judge Fine was disqualified as a matter of law from participating in *Brown*. Disqualification, if appropriate here, would have fallen under the

sec. 757.19(2)(g), Stats., which provides that "[a]ny judge shall disqualify himself or herself from any civil or criminal action or proceeding when . . . [the] judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

> As explained by the supreme court in *American TV*:
>
> Section 757.19(2)(g), Stats., mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner.
>
> * * *
>
> . . . [B]ecause the basis for disqualification is subjective, requiring the judge's determination of an actual or apparent inability to act impartially, there is no standard to apply on review other than an objective one limited to establishing whether the judge made a determination requiring disqualification. *American TV*, 151 Wis. 2d at 183, 186, 443 N.W.2d at 665, 666.

Based on *American TV*, this court has held that "once a . . . judge determines that there is no partiality or appearance of partiality under sec. 757.19(2)(g), his [or her] decision on that matter is reviewable only to establish whether the . . . judge . . . made a determination requiring recusal and failed to heed his [or her] own finding." *State v. Carivou*, 154 Wis. 2d 641, 646, 454 N.W.2d 562, 564 (Ct. App. 1990).

As indicated in Judge Fine's non-participating opinion, Judge Fine has informed this court that he determined that he could act fairly and impartially prior to taking part in *Brown*. Since Judge Fine made that determination before participating in the case, we conclude that under sec. 757.19(2)(g), Stas., Judge Fine was not disqualified.

In sum, then, although we are concerned about Brown's delay in raising the issue, we do accept the responsibility—always, absent some extraordinary circumstance—to review a claim that a judge was disqualified as a matter of law from participating in a decision, and we will consider this claim even after the case has been remitted to the trial court. We stress, however, as did the supreme court in *American TV*, 151 Wis. 2d at 192, 443 N.W.2d at 669, that an attack on the validity of a judgment of this court on the ground of a member's disqualification by law for an apparent inability to act impartially is a serious matter and should not be undertaken lightly.

By the Court.—Motion denied.

This opinion will not be published. *See* Rule 809.23(1)(b)5, Stats.

Fine, J. (*non-participating*). As related by the *per curiam* decision, Juanita S. Brown seeks vacatur of this court's decision in *Brown v. Farhoud*, No. 91-0444, (Wis. Ct. App. Feb. 4, 1992). She contends that section 757.19(2)(g), Stats., required my recusal from the panel. Although I have determined that my participation in the decision on Brown's motion would be inappropriate, I believe that the parties and the court should understand why I did not disqualify myself from *Brown*. *Cf. State v. American TV & Appliance of Madison*, 151 Wis. 2d 175, 183, 443 N.W.2d 662, 665 (1989) (Supreme Court justice's post-decision letter to parties recounted his pre-decision determination that he was not disqualified under section 757.19(2)(g), Stats.) (denying motion to vacate decision).

As Brown points out in her submissions in support of her motion to vacate, I made it a practice while a circuit judge to disqualify myself from cases in which a party was represented by the attorney who represented Brown

before the trial court and on the appeal in this matter. That practice stemmed from my apprehensions concerning the lawyer's candor with the court as the result of a 1981 incident, which the lawyer later recounted in a letter to me of August 21, 1986:

> You have accused me of misleading you in the past. As I have already explained this is not true. I told you that I was supposed to be in another court on the date in question to finalize my participation in a jury trial before reporting to your court to start another jury trial. Between the time that I had instructed my secretary to call you and the time that she did call you the next day, I had already completed my role in the jury trial in the other court with no further word to my secretary. Therefore, when she called you she did not know that another lawyer from our office was in the other court and that I would be going directly to your court. I was delayed in arriving to your court for another reason and when you inquired in regard to my whereabouts, I merely said my secretary called, remembering she was to call for the other reason. You have now indicated that you will recuse yourself in any cases in which my office is involved. This disappoints me to say the least, because I have always enjoyed working with you and have the highest respect for your manner. Through the years we have had our differences, but only I trust in the interests of doing our best. I am sorry that our relationship has ended on a sour note and hope in time you will realize that your concern has been misplaced.

Upon receipt of the briefs in *Brown*, I noticed that Brown was represented by the lawyer, and I recalled my practice as a circuit judge to recuse myself from his trial-court cases. Nevertheless, I decided not to recuse myself from the appeal.

Trial judges must be able to accept representations by counsel at face value. Proceedings at the appellate level are, in contrast, completely circumscribed by the record. *In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 571, 307 N.W.2d 881, 895 (1981). A brief's representations must be supported by record references, Rule 809.19(1)(d), Stats., which will either support or belie those representations. Similarly, representations as to the law must also be supported by citation to legal authority. Rule 809.19(1)(e), Stats. Here, too, the cited legal authority will either support or belie the representations. Under these circumstances, I determined that my doubts concerning the lawyer's candor could not, and would not, affect my ability to decide the case fairly and impartially. Apparently, the lawyer agreed since he neither inquired as to whether I would be sitting on the panel—even though he had, at least on one occasion, made a similar inquiry when I was on the circuit court—nor sought my disqualification. Based on the foregoing, I concluded that I could fairly and impartially decide the issues raised in the *Brown* appeal, and that my impartiality could not be reasonably questioned.

DISTRICT I

Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, March 16, 1993

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You are hereby notified that the court entered the following order:

92-2369 Lukowski v. Dankert et al.

Before Fine, J.

By motion dated December 22, 1992, and received by the Clerk of the Court of Appeals on December 28, 1992, Kathy Lukowski, the appellant on this appeal, sought the following relief: "that the Honorable Ralph Adam Fine recuse himself from participating in this appeal for the reasons set forth in the affidavit which is attached hereto." Attached to Lukowski's motion is a document signed by her attorney on this appeal, Gerald R. Turner, Esq. Although the document purports to be an affidavit, it was not signed under oath. The motion and document are attached to this order as Exhibit One.

By letter dated January 20, 1993, the Clerk of the Court of Appeals notified Mr. Turner that the motion would be considered if and when I was assigned the appeal in this matter:

> I am sure you are aware that the court to which this appeal is assigned, District I, is comprised of four judges and cases are assigned randomly to three-judge panels. Because the briefing has not yet been completed, this appeal has not been assigned to a three-judge panel for disposition. Your motion is premature because it is quite possible that Judge Fine will not be assigned to the panel disposing of this appeal. The court will decide the motion on its merits once a three-judge panel is assigned.

This appeal has now been assigned to a three-judge panel in District I, and I am on the panel. Thus, Lukowski's motion is ripe for decision.

The question of whether I should recuse myself from an appeal in which Mr. Turner represents one of the parties has been raised before—by Mr. Turner in a post-decision motion to vacate. *See Brown v. Farhoud*, No. 91-0444 (Wis. Ct. App. October 6, 1992) (denying motion to vacate) (no pre-decision motion to recuse was brought in *Brown*). A copy of the court's October 6 order in *Brown* and my non-participating opinion is attached to this order as Exhibit Two. For the reasons expressed in the non-participating opinion in *Brown*, Lukowski's motion is denied.

Therefore,

IT IS ORDERED that the motion to have me recuse myself is denied.

Marilyn L. Graves
Clerk of Court of Appeals

92-1567

No. ~~91-1116~~

U.S.
APR 21 1993
THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JUANITA S. BROWN,

Petitioner,

vs.

INSHIRAH FARHOUD and GERMANTOWN MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the Wisconsin Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court lacks jurisdiction over the Petition for Writ of Certiorari due to petitioner Juanita S. Brown's (Brown) failure to properly raise the present constitutional claims in the state proceedings below?

PARTIES BELOW

The names of all parties to the proceedings in the Wisconsin Supreme Court appear in the caption of the case. Respondent Inshirah Farhoud (Farhoud) is an adult individual. Farhoud has no parent company or any subsidiaries. Respondent Germantown Mutual Insurance Company (Germantown) is a Wisconsin corporation duly organized and existing pursuant to the laws of the State of Wisconsin. Germantown does not have a parent company or any subsidiaries.

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No. 91-1116

In The

Supreme Court of the United States

October Term, 1992

JUANITA S. BROWN,

Petitioner,

vs.

INSHIRAH FARHOUD and GERMANTOWN MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the Wisconsin Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The Order from the Wisconsin Supreme Court denying Brown's Petition for Review is reproduced in the Appendix to the Petition for Writ of Certiorari at App. 1-3. The decision of the Wisconsin Court of Appeals denying Brown's motion to vacate the Wisconsin Court of Appeals' opinion filed February 2, 1992 is reproduced in the Appendix to the Petition for Writ of Certiorari at App. 4-9.

STATEMENT OF JURISDICTION

In the Petition for Writ of Certiorari, Brown alleges 28 U.S.C. § 1257(a) confers jurisdiction on this Court to review the judgment in question by Writ of Certiorari. However, at no time prior to the present Petition for Writ of Certiorari did Brown ever raise the issue of whether § 757.19(2)(g), Wis. Stats. violates the due process clause and/or the equal protection clause of the Fourteenth Amendment to the United States Constitution. Brown's other federal claims based upon the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution were never raised before the Wisconsin Court of Appeals in Brown's Motion to Vacate Court of Appeals' Opinion dated February 4, 1992. Thus, these claims were never considered or decided by the Wisconsin Court of Appeals or the Wisconsin Supreme Court below. As a result, this Court lacks jurisdiction over the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wis. Stats., § 757.19(2)(g):

> Disqualification of Judge. . . . (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> * * *
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

STATEMENT OF THE CASE

The present matter before the Court arises out of a personal injury action brought by Brown against Farhoud and Germantown for injuries sustained by Brown in a fall on Farhoud's premises. The case was originally tried to a jury and the jury returned a special verdict in favor of Brown, finding Farhoud 85% causally negligent and Brown 15% causally negligent. The jury awarded Brown the sum of $60,000 in damages for past and future pain, suffering and disability.

Farhoud and Germantown moved the trial court on motions after verdict for a change in the verdict on the questions of negligence and damages. The trial court denied their motion on the issue of negligence but granted their motion on the issue of damages. The trial court remitted the award for past and future pain, suffering and disability from the sum of $60,000 to the sum of $45,000 an amount which the court found to be reasonable as a matter of law. Brown was then given the option of accepting the reduced award or a new trial on the issue of damages, pursuant to § 805.15(6), Wis. Stats.

Brown decided not to accept the reduced award and opted for a new trial on the issue of damages. After the second trial, a jury

returned a special verdict awarding the sum of $10,000 as damages for past and future pain, suffering and disability. After the second trial, Brown, Farhoud and Germantown moved the trial court on motions after verdict for a change in the special verdict answers, with Brown requesting an increased award and Farhoud and Germantown requesting a reduced award. The trial court denied these motions and judgment was entered on the jury's verdict.

On February 25, 1991, Brown filed an appeal with the Wisconsin Court of Appeals. By opinion dated February 4, 1992, the Wisconsin Court of Appeals affirmed the trial court's decision to reduce the original award for pain and suffering from $60,000 to $45,000 and the trial court's denial of Brown's request for additur at the close of the second trial. At no time prior to or after filing the original appeal before the Wisconsin Court of Appeals did Brown's initial attorney, Gerald R. Turner, ever request that Judge Fine recuse himself pursuant to § 757.19(2)(g), Wis. Stats. At no time prior to the original appeal before the Wisconsin Court of Appeals did Attorney Turner, ever notify Farhoud and/or Germantown of the alleged "history" between Attorney Turner and Judge Fine.

After receiving the Wisconsin Court of Appeals' opinion dated February 4, 1992, Brown did not file a motion to reconsider nor did she file a Petition for Review with the Wisconsin Supreme Court pursuant to Wis. Stats., § 808.10; 809.62(1). Instead, on July 17, 1992, Brown filed a Motion to Vacate Court of Appeals' Opinion dated February 4, 1992. By opinion dated October 6, 1992 the Wisconsin Court of Appeals denied Brown's motion to vacate. On November 5, 1992, Brown filed a Petition for Review with the Wisconsin Supreme Court. On December 23, 1992, the Wisconsin Supreme Court ordered that Brown's petition be denied with Justice Shirley S. Abrahamson dissenting. The Wisconsin Supreme Court issued no opinion in ordering that Brown's petition be dismissed.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO ADDRESS BROWN'S CONSTITUTIONAL CLAIMS BECAUSE BROWN NEVER RAISED ANY CONSTITUTIONAL CLAIMS BEFORE THE WISCONSIN COURT OF APPEALS AND NEITHER THE WISCONSIN COURT OF APPEALS OR THE WISCONSIN SUPREME COURT ISSUED AN OPINION RELATING TO BROWN'S CONSTITUTIONAL CLAIMS.

It is a well established principle that this Court will not decide federal constitutional issues raised in this Court for the first time on review of state court decisions. *Webb v. Webb,* 451 U.S. 493, 496-97 (1981); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *Moore v. Illinois,* 408 U.S. 786, 799 (1972). In support of her motion to vacate the Wisconsin Court of Appeals' decision dated February 4, 1992, Brown raised the following arguments:

> 1. Judge Fine was required to exercise discretion pursuant to § 757.19(2)(g) to determine if he was impartial or if there was an appearance of partiality precluding him from participating in the original appeal of the underlying case;
>
> 2. Assuming Judge Fine did not exercise his discretion as required by § 757.19(2)(g), the Wisconsin Court of Appeals' decision dated February 4, 1992 was void; and
>
> 3. Even if Judge Fine determined he could act impartially pursuant to § 757.19(2)(g) his

> decision, as a matter of law, would be in error and his participation in the case would render the Wisconsin Court of Appeals' decision dated February 4, 1992 void.

Brown never raised the separate issue of whether Judge Fine's participation in the underlying case implicated the due process clause and/or equal protection clause of the Fourteenth Amendment to the United States Constitution. Brown did not request the Wisconsin Court of Appeals to apply an objective analysis to determine whether there was an appearance of partiality on the part of Judge Fine. Brown never asserted that § 757.19(2)(g), Wis. Stats. is unconstitutional. As a result, those issues were never decided by the Wisconsin Court of Appeals. The Wisconsin Court of Appeals denied Brown's motion to vacate. App. 4-7.

On November 5, 1992, Brown filed a Petition for Review of the Wisconsin Court of Appeals' decision to the Wisconsin Supreme Court. In Brown's petition before the Wisconsin Supreme Court, Brown argued review by that court was appropriate asserting Wisconsin law is presently ambiguous concerning the issue of judicial disqualification. Brown argued it is questionable, in the wake of the Wisconsin Supreme Court's decision in *State v. American TV and Appliance of Madison, Inc.*, 151 Wis. 2d 175, 443 N.W. 2d 662 (1989), whether Wisconsin law still allows an objective analysis under the due process clause in determining whether a judge should be disqualified in a certain case. Brown also argued, assuming an objective standard is still viable, that Wisconsin law is unclear as to what the objective standard is and whether Judge Fine's decision that he was impartial pursuant to § 757.19(2)(g), Wis. Stats. was wrong as a matter of law. In summary, Brown alleged review was appropriate in order to clarify what Brown characterized as "conflicting decisions" between the Wisconsin Court of Appeals and Wisconsin Supreme Court

relating to the issue of judicial disqualification. Brown never raised the argument that § 757.19(2)(g), Wis. Stats. is unconstitutional.

In response to Brown's Petition for Review before the Wisconsin Supreme Court, Farhoud and Germantown argued, in pertinent part, that Brown waived her right to raise the constitutional claims actually identified in Brown's Petition for Review for failure to raise these issues before the Wisconsin Court of Appeals. *See State v. Yellow Freight System, Inc.*, 101 Wis. 2d 142, 158, 303 N.W. 2d 834 (1981) (Wisconsin Supreme Court ". . . will not entertain a constitutional issue raised for the first time on appeal unless there is some compelling reasons for doing so".) The Wisconsin Supreme Court denied Brown's Petition for Review without issuing an opinion. Justice Shirley S. Abrahamson provided a lone dissenting opinion. App. 1-3. The Wisconsin Supreme Court did not address Brown's constitutional claims and, as of the date of this brief, has yet to address the constitutionality of § 757.19(2)(g).

On numerous occasions, this Court has stated that when "the highest State court has failed to pass upon a constitutional question, it will be assumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this court can affirmatively show the contrary." *Webb v. Webb, supra,* 451 U.S. at 496-97; *Street v. New York,* 394 U.S. 576, 582 (1969); *Bailey v. Anderson,* 326 U.S. 203, 206-07 (1945). Because Brown failed to properly raise her constitutional claims in the state proceedings below, and the Wisconsin Supreme Court did not rule on the federal issues raised by Brown in the Petition for Writ of Certiorari, this Court lacks jurisdiction over this case. *Webb. v. Webb., supra,* 451 U.S. at 501-02.

Moreover, this Court, pursuant to the doctrine of abstention, should refrain from entertaining jurisdiction in this case. The doctrine of abstention applies here since the Wisconsin Supreme

Court has yet to address the constitutionality of § 757.19(2)(g) and that statute may be construed by the Wisconsin Supreme Court in a manner that would avoid or modify the federal question presented here. *Zwickler v. Koota,* 389 U.S. 241, 248-49 (1967).

II.

BROWN WAS NOT DENIED HER CONSTITUTIONAL RIGHTS UNDER THE DUE PROCESS CLAUSE AND/OR EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE BROWN NEVER REQUESTED THE WISCONSIN COURT OF APPEALS TO APPLY AN OBJECTIVE ANALYSIS PURSUANT TO THE DUE PROCESS CLAUSE.

In Brown's Petition for Writ of Certiorari, she concedes, as she must, that under Wisconsin law there are two arguments a litigant may raise in seeking to have a judge disqualified due to concerns over the judge's partiality. A litigant may assert recusal is required under § 757.19(2)(g), Wis. Stats. The Wisconsin Supreme Court in *State v. American TV and Appliance, supra,* held the basis for judicial disqualification under § 757.19(2)(g) is a subjective one. Therefore, the determination of the "existence of a judge's actual or apparent inability to act impartially is for the judge to make." *State v. American TV and Appliance, supra,* 151 Wis. 2d at 183. A litigant may also assert that a judge must be disqualified on the grounds the judge's impartiality can reasonably be questioned. *State v. Walberg,* 109 Wis. 2d 96, 105, 325 N.W. 2d 687 (1982); *State v. Asfoor,* 75 Wis. 2d 411, 436, 239 N.W. 2d 529 (1977). Under Wisconsin law, whether a judge's impartiality can reasonably be questioned is a question of law for a reviewing court to determine. *State v. Rochelt,* 165 Wis. 2d 373, 379, 477 N.W. 2d 659 (Ct. App. 1991).

Brown's claim that the Wisconsin Court of Appeals and the Wisconsin Supreme Court denied Brown her constitutional rights ignores the fact that Brown never requested the Wisconsin Court of Appeals to undergo such an analysis in her Motion to Vacate the Court of Appeals' Opinion dated February 4, 1992. Brown simply did not avail herself of the arguments she now cites in the present petition.

Furthermore, this Court has stated that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of . . ., personal bias, . . . would seem generally to be matters merely of legislative discretion." *Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813, 820 (1986); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also, FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level".) Under only two circumstances has this Court ever considered charges of judicial bias sufficient to rise to a constitutional level: Where the "judge has a direct, personal, substantial, pecuniary interest in the case before him", *Tumey, supra,* or where it is alleged the judge was influenced by generalized hostility towards certain kinds of businesses. *Aetna, supra. See Delvechio v. Illinois,* 494 U.S. 1062, 1063 (1990) (Marshall, J. dissenting). Since neither of these circumstances apply in the present case, Brown's due process claim and equal protection claim fail as a matter of law.

CONCLUSION

This Court must deny Brown's petition since Brown failed to properly raise the constitutional claims contained in the petition in the state proceedings below. Neither the Wisconsin Court of Appeals nor the Wisconsin Supreme Court addressed these constitutional claims. Therefore, this Court lacks jurisdiction over Brown's petition. *See Webb, supra.*

Furthermore, Brown's argument that she was denied her

constitutional rights under the due process clause and equal protection clause are unsupported. These claims were not addressed by the Wisconsin Court of Appeals or Wisconsin Supreme Court due to Brown's failure to properly raise them in her Motion to Vacate Court of Appeals' Opinion dated February 4, 1992. Moreover, the allegations of bias directed against Judge Fine are not of the type sufficient to rise to a constitutional level. *See LaVoie, supra; Tumey, supra.* Therefore, Brown's constitutional claims fail as a matter of law.

Certiorari should be denied.

Dated : April 20, 1992.

Respectfully submitted,

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Respondents.

Petition for Writ of Certiorari to the Wisconsin Court of Appeals

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The Petitioner, Juanita S. Brown, incorporates herein by reference each section of her Petition for Writ of Certiorari. The following arguments are in reply to Respondents' Brief in Opposition to the Petition.

ARGUMENT

I.

THE PETITIONER'S CONSTITUTIONAL ARGUMENTS WERE RAISED BEFORE THE WISCONSIN COURT OF APPEALS AND THE WISCONSIN SUPREME COURT.

Contrary to the respondents' argument, the petitioner raised the constitutional arguments in both the Wisconsin

Court of Appeals and the Wisconsin Supreme Court. The Wisconsin Court of Appeals issued an opinion adverse to the petitioner. The petitioner appealed that decision via a petition for review to the Wisconsin Supreme Court. A majority of the Wisconsin Supreme Court denied the petition for review without opinion. Justice Shirley S. Abrahamson dissented from the Wisconsin Supreme Court's opinion.

In the Wisconsin Court of Appeals the petitioner raised the constitutional issues. In the last section of her brief filed with the Wisconsin Court of Appeals, the petitioner argued that even if Judge Fine applied the subjective analysis on recusal under Wisconsin law and determined on his own that he should not be recused, he should have been recused nonetheless because the history of recusals evidenced an "appearance" of partiality. The petitioner argued to the Wisconsin Court of Appeals:

> Judge Fine's past actions and decisions are indicative of his previous determination of the existence of the **apparent** inability to act impartially in cases involving Turner.

The "appearance of partiality" issue is the same objective constitutional due process issue raised in the petition filed with this court.

Without question, the petitioner raised the constitutional issue in its petition for review to the Wisconsin Supreme Court. The second argument of the petitioner before the Wisconsin Supreme Court was titled:

> "A REAL AND SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW IS PRESENTED."

In the Wisconsin Supreme Court the petitioner again raised the constitutional argument and cited several United States Supreme Court decisions which were in conflict

with the Wisconsin statute which permits the subjective test to be the determiner of whether a judge should be recused.

Thus, the claim by the respondents that the issues before the United States Supreme Court were not raised below are without merit.

II.

ASSUMING ARGUENDO THAT THE CONSTITUTIONAL QUESTIONS WERE NOT RAISED BELOW, THE PETITIONER IS NOT PRECLUDED FROM RAISING THEM IN THIS COURT.

Even **if** it were determined that the petitioner did not raise the constitutional arguments in the courts below, the petitioner is not automatically precluded from raising these issues with this court. Although the United States Supreme Court does not normally decide issues not presented below, the court is not precluded from doing so. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *citing Youakim v. Miller*, 425 U.S. 231 (1976).

In several cases this court has determined that the question presented was so important that even though it was not raised below it could be raised in the Supreme Court. For example, in *Wood v. Georgia*, 450 U.S. 261 (1981), a state court decision was reviewed concerning a conflict of interest in likely violation of the due process clause. The due process ingredient had not been challenged below or in the petition for certiorari. This court found that a remand was "required in the interests of justice," and noted that when there is fundamental unfairness in the proceedings it will exercise jurisdiction. *Wood*, 450 U.S. at 265, n.5. The petitioner here has likewise argued that there has been a "fundamental unfairness" in the proceed-

ings in the Wisconsin Court of Appeals when Judge Fine presided over her appeal despite a history in which there was a blatant appearance of partiality and actual self disqualification by the judge over a period of 9 years.

CONCLUSION

Because the constitutional issues were raised in both the Wisconsin Court of Appeals and the Wisconsin Supreme Court and the Court of Appeals decision was adverse to the petitioner and the Supreme Court did not entertain the petitioner's petition for review, the constitutional issues are properly before this court.

In any event, this court has the power to decide these important issues concerning the petitioner's constitutional rights.

Dated: April 30, 1993.

Respectfully submitted,

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